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AUTHOR Rebell, Michael A.
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ABSTRACT

Legal implications of competency-based education (CBE) could be substantial, because the CBE approach would articulate specific standards applicable in employer and institutional actions which are now upheld by the courts for lack of accountability standards. Six problem areas relating to CBE's effect on employment and educational institutions are discussed, along with a list of further research needs in each area: discriminatory employment practices, irrational employment practices, process standards, institutional accountability, job security issues, and implementation problems. Even if not fully implemented, CBE could have a profound effect on current educational practices, on the broad domains of employment selection and retention, and on government regulation of licensing and credentialing practices. (MF)

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LEGAL AND LEGISLATIVE IMPLICATIONS OF COMPETENCY-BASED EDUCATION

by

Michael A. Rebell, Esq.
Rebell & Krieger
Attorneys at Law
230 Park Avenue
New York, New York 10017

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Prepared for:

Educational Policy Research Center
Syracuse Research Corporation
Merrill Lane, University Heights
Syracuse, New York 13210

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INTRODUCTION

It is our understanding that the term "competency-based education" ("CBE") refers to an attempt to revise the curricula and teaching approaches at colleges and secondary schools to insure that students are being taught skills, behaviors, and information ("competencies") which are directly related to specific functions that such students will perform as workers and as citizens after graduation.

Obviously, the articulation of functionally relevant "competencies" for the diverse work and civic roles to be performed by citizens in our complex society is an enormous task. It is far from clear that presently existing or even potentially available assessment techniques are capable of fully achieving such a monumental task. But even if competency-based education is not implemented to the full extent of its conceptual implications, progress toward that ideal could still have a profound effect in reforming current educational practices.

Widespread adoption of CBE would also have substantial legal implications, extending not only to rights and obligations of individuals within educational institutions, but also to the broader domains of employment selection and retention practices, and governmental regulation of licensing and credentialing practices. The legal implications of CBE could be dramatic and far-reaching, primarily because this approach promises to articulate specific rational standards which could be applied in dozens of situations where employer or official actions currently are almost uniformly upheld by the Courts for lack of any valid accountability standards.

Although it is difficult, at this early stage of the CBE movement, to pinpoint the precise legal issues which may arise, we have isolated six problem areas worthy of further analysis and research which have emerged from our experience working with CBE in the teacher training area and from our analysis of general literature relating to CBE in a variety of other fields. For the sake of brevity, detailed citations to relevant legal authorities have been omitted. Such citations are available upon request.

A. DISCRIMINATORY EMPLOYMENT PRACTICES

Title VII of the Federal Civil Rights Act of 1964 prohibits private and public employers from engaging in discriminatory practices in their hiring policies. Under the guidelines issued by the Equal Employment Opportunity Commission pursuant to the Act, discriminatory utilization of ability "tests," including "specific educational...requirements," have been proscribed.

In practice, what these proscriptions mean is that if minority group applicants (including women) fail, in disproportionate numbers, to qualify for employment or advancement because of tests or credential requirements utilized by an employer, the employer has the burden of proving the "job-relatedness" of these requirements in accordance with specific validation techniques prescribed by the Commission. Under existing validation standards, courts have, in many instances, struck down specific paper and pencil tests, but only in a few isolated cases have high school or college degree requirements been held to be non-job related. It can be expected that expansion of the CBE movement will substantially increase the empirical data available to plaintiffs to show that many existing credential requirements, as well as many existing written examinations, are not directly related to performance skills needed on the job.

The implications of the potential impact of CBE in broadening the applicability of Title VII would extend not only to individual employers, but also to statewide licensing boards which presently require certain levels of college or graduate degrees as prerequisites for licensing in a variety of professional fields. For example, the articulation of standards generated by the CBE movement might well permit qualified, experienced community workers to be licensed as human service professionals, or law clerks or paraprofessionals to become lawyers, despite their lack of college or graduate degrees.

The impact of CBE in removing grossly irrational credential requirements can prove an important reform in eliminating many discriminatory employment barriers. However, overly rigid application of E.E.O.C. validation standards (conceived primarily in regard to industrial employer entrance examinations) could result in an undesirable and unnecessary debasement of the values of schooling and degrees, in general (or to a backlash movement to amend the E.E.O.C. Guidelines to eliminate prohibitions against discriminatory credential requirements).

Further Research Needs:

1) Analysis of validation techniques prescribed under the E.E.O.C. Guidelines to determine the full significance of their applicability to credential requirements in the light of CBE;

2) Suggestions for revisions of Title VII and the E.E.O.C. Guidelines on the basis of the foregoing analysis.

B. IRRATIONAL EMPLOYMENT PRACTICES

As indicated in the previous section, the requirements under Title VII and the E.E.O.C. Guidelines that employers demonstarte the validity of their employment selection standards, come into play only if it has been shown, in a specific case, that existing employment selection devices actually discriminate against minority group applicants. Implementation of CBE can be expected to increasingly indicate that many existing job requirements are unvalidated and irrational. Under such circumstances, it would appear unconscionable to hold that only members of minority groups, but not the public in general, can seek legal protection from irrational job selection standards.

Since the 1930's, courts in this country have generally refused to examine, in depth, the specific rationales or justifications behind legislative enactments such as licensing laws, despite the fact that these laws often

directly limit an individual's liberty to pursue a chosen occupation. Intense judicial scrutiny has been undertaken only when such laws appeared to involve "fundamental interests" or "suspect classifications" unduly burdening blacks or other minority groups. Implementation of CBE may well provide a basis for revitalizing dormant notions of "substantive due process" and "rational relationship." The courts' historical reluctance to require governmental officials to justify the validity of licensing requirements might be overcome if validation standards for licensing regulations were available to provide the courts with specific tools for assessing the rationality of existing practices. (The availability of specific assessment standards under the E.E.O.C. Guidelines has already led some courts to begin to re-examine traditional notions of "substantive due process" under the Fourteenth Amendment.)

Further Research Needs:

1) Analysis of recent court decisions and trends in the areas of "substantive due process" and "rational relationship" to determine the likelihood of future actions by the courts to invalidate irrational employment practices.

2) Consideration of the feasibility of new federal or state legislation proscribing irrational licensing and employment selection practices.

C. PROCESS STANDARDS

Articulation in the immediate future of valid competency criteria for each of the numerous occupational and liberal arts areas being considered by advocates of CBE appears to be a difficult, if not insuperable, task. The most optimistic timetable for achievement of precise assessment techniques for measuring the relevant performance criteria of classroom teachers sets 1990 as a workable goal. Articulation of comparable criteria for professions involving more diverse, abstract, and constantly changing competencies such as human services would seem even more difficult to achieve in the foreseeable future.

Although CBE may not, in the short run, achieve its ideal goal of directly correlating skills taught in the classroom with specific job requirements, CBE innovations are likely to result in profound reforms of current educational practices. At the least, schools and colleges will be compelled to begin to analyze their offerings and to clarify their goals and objectives.

Focusing attention on purposes, goals and objectives will inevitably raise questions as to who should properly be involved in the task of establishing these criteria. Even if "competencies" cannot be fully based on scientific assessment techniques, courts are likely to be persuaded that criteria which are established through objective procedures are a reasonably valid indication of objective substance. Existing subjective standards for degree requirements, licensing standards, or job selection criteria may thus be held to be irrational and in contravention of due process rights because of their failure to include all interested viewpoints in their formulation.

Further Research Needs:

1) Analysis of judicial decisions in evaluation and licensing cases to determine which standards courts have applied in the past to ensure objective processes for goal articulation and which standards courts might be expected to apply in the future if CBE is widely adopted.

2) Specific analysis of the procedures used by private accrediting agencies to evaluate and certify educational institutions.

3) Drafting of model legislation that would set forth the roles that administrators, teachers, students, practioners, community representatives, etc., should play in the formulation of rational credential and employment selection standards.

D. INSTITUTIONAL ACCOUNTABILITY

Implementation of CBE will, of necessity, establish more precise standards by which the performance of teachers and educational institutions may

be measured. Legal challenges to the failures of schools to adequately teach their students have, to date, been stymied by the inherent implausibility of general negligence theories upon which they have sometimes been based or by their over-reliance on a limited number of objective performance indicators like reading scores which fail to provide a credible indication of overall student achievement, especially when these must be viewed in the light of pre-existing socio-economic disadvantages. With CBE, it will be possible to measure the overall performance of teachers and schools and to hold them accountable for shortcomings.

On the college level, availability of specific CBE standards could provide a detailed data basis for students to consider in applying to a particular school, and, conceivably, to demands for colleges to enter into contracts which will set forth teaching goals and anticipated results with their students. CBE might also provide a justification for establishment of a due process right of students to contest the grades or grading practices of schools and particular instuctors. At the high school level, CBE could provide a significant evidential basis for the nascent movement seeking to establish a right to a "suitable education" for all students, especially those in the "drop-out" or "push-out" category who presently are assigned to schools whose offerings and approaches are often irrelevant to their backgrounds and real learning needs.

Further Research Needs:

1) Analysis of the impact of CBE on trends toward judicial articulation of a "right to suitable education," on education voucher theories, and on existing and proposed legislation to hold schools accountable for their performance.

2) Exploration of the concept of student contracts for educational services and of possible remedies for breach of such contracts.

3) Exploration of the feasibility of establishing student due process rights to contest grades or grading practices.

E. JOB SECURITY ISSUES

It is apparent that widespread implementation of CBE must inevitably lead to fundamental rethinking of contemporary tenure and evaluation standards in many areas. Once precise job-related performance measures become available, it will be clear that many present practitioners who qualified under more nebulous prior criteria may be judged relatively or absolutely incompetent for present day needs. Furthermore, even for individuals who qualify under new CBE standards, the concept of tenure must be re-examined. In the past, individuals who achieved a tenured status were, for all practical purposes, immovable from their positions; for lack of any precise standards, legally sufficient charges of incompetence could almost never be lodged against them. CBE will provide a basis for meaningful, continuing performance re-evaluations. And since under CBE applicable competencies will change as the nature of job requirements change, substantial pressures will mount to revise present tenure concepts to provide for mandatory periodic re-assessments of tenured personnel and for mandatory re-licensing of professionals.

In addition, the criteria for more precise measurement of relevant individual performance capabilities under CBE will tend to undermine the predominant pattern of reverse seniority lay-off provisions included in many current statutes and labor contracts. If the relevant abilities of different workers can be more accurately delineated, employers (and the public at large in the case of public sector employees) will be loathe to permit the less competent to remain on the job when reductions of staff are required.*

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*Although CBE can be expected to generally have the effect of undermining the job security of many workers, it may, however, provide greater employment stability for many others. For example, individuals who are currently hired for a probationary period, subject to the employer's discretion to terminate their status at any time, "for any reason," will be in a position to assert that the availability of precise performance criteria renders the discretionary firing system arbitrary and irrational and entitles them, at the least, to an explanation and a hearing prior to discharge.

Further Research Needs:

1) Reconsideration of purposes and legal justifications for tenure and seniority laws in the light of CBE implications;

2) Drafting of model statutes and model contractual provisions to balance legitimate job security needs of workers and legitimate accountability needs of employers and the public, in the light of CBE.

F. IMPLEMENTATION PROBLEMS

Assuming the basic desirability of CBE, a variety of legal problems arise concerning its widespread implementation. Specific CBE goals or processes might be mandated as a requirement for all educational programs by the relevant state authorities. Such mandates might, however, present difficulties under relevant concepts of legislative delegability. Case law in some states would appear to preclude state education departments from utilizing their general authority to ensure efficient educational processes to mandate detailed CBE reforms at the school level. (This problem has already arisen in the context of attempts to mandate CBE at teacher training institutions.) On the other hand, to remand articulation of CBE standards to the legislative process may present substantial feasibility problems and, even if appropriate statutes can be drafted and enacted, on-going amendment and revision of such statutes in the light of knowledge gained through experience may be difficult. Furthermore, the legal authority of state officials or legislatures to mandate detailed CBE for private schools may, in many instances, be problematic.

As an alternative implementation approach, consideration might be given to a voluntary inducement model which would provide special grants or other funding to schools which choose to adopt CBE approaches. Consumer-oriented legislation might also be enacted which would grant students attending or applying to colleges (or even secondary schools) a right to demand detailed information on institutional goals and approaches or to

enter into contracts through which schools could be held accountable for providing specified processes and learning situations.

Further Research Needs:

1) Detailed review of law on delegability and supervision of private educational institutions in the various states;

2) Feasibility studies of mandated CBE.

3) Drafting of model state or federal statutes for CBE grants;

4) Analysis of educational consumer protection concepts and drafting of model state or federal statutes in this area.